ing law and order may well demand that a policeman in the exercise of his duty be unhampered by the apprehension of possible lawsuits against either himself or the city. So also there may be a strong public interest in sending the fire engine to the scene of the fire as soon as possible, unchecked by thought of liability for what happens *en route*.[25] But unless the presence of some public interest can be affirmatively shown to require a denial of recovery, the municipal corporation should not be granted exemption. It is difficult to find any useful purpose furthered by exempting for the trespass of the fire horse that casually wanders from his stable,[26] or for the condition of the town hall, or the acts of its janitor in removing snow from the roof.[27] To restate the law of municipal liability according to this view calls for a return to first principles through a careful, conscious analysis of the underlying interests in each case. On analogy to general tort principles such a process is entirely sound; and it is necessary if this branch of the law is to be shaped into a consistent, satisfactory system.[28]

JURISDICTION OF EQUITY TO GRANT A RECEIVER WHERE NO OTHER RELIEF IS SOUGHT. — A Pennsylvania County Court has granted a receiver for the property of an individual, upon the petition of unsecured creditors who sought no other relief to which a receivership would properly be ancillary. *Thompson's Receivership*, 44 Pa. County Court, 518.[1] The decision is a novel one. It is a generally accepted rule that equity has no jurisdiction without statute[2] to appoint a receiver for a fully capable legal person,[3] in a case where such appointment is the sole object of

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[25] Wilcox *v.* City of Chicago, 107 Ill. 334.

[26] See 19 HARV. L. REV. 386.

[27] Kelley *v.* City of Boston, 186 Mass. 165, 71 N. E. 299.

[28] On the principles here advocated there would be liability in most, if not all cases arising from property ownership. See JONES, NEGLIGENCE OF MUNICIPAL CORPORATIONS, 36. Miles *v.* City of Worcester, 154 Mass. 511, 28 N. E. 676; Briegel *v.* City of Philadelphia, 135 Pa. St. 451, 19 Atl. 1038. (But *cf.* Ham *v.* Mayor, etc. of New York, 70 N. Y. 459.) Recovery should be granted where the dangerous condition of a fire engine injures a workman engaged in repairing the same. City of Lafayette *v.* Allen, 81 Ind. 166. So also for negligence in building a cistern for the use of the fire department. Mulcairns *v.* City of Janesville, 67 Wis. 24, 29 N. W. 565. And streets and sewers would cease to be the anomalous exceptions to the rules regulating liability that they are at present.

[1] For a fuller statement of the facts, see RECENT CASES, p. 289. An ancillary receiver was appointed in the Federal District Court in West Virginia, but on appeal the Circuit Court of Appeals held this appointment void. (Not yet reported.) Application has been made to the Supreme Court for a writ of *certiorari* to review this last decision.

[2] Where a statute provides for the appointment of a receiver for a corporation which is insolvent or in danger of insolvency, the courts in some cases have apparently considered that the statute meant that a receiver could be appointed where this was the sole object of the suit. Hall *v.* Nieukirk, 12 Idaho 33, 85 Pac. 485; *In re* Lewis, 52 Kan. 660, 35 Pac. 287; Mauch Chunk Bank *v.* U. S. Encaustic Tile Co., 105 Ind. 227, 4 N. E. 846. It is questionable even in these cases, however, whether the receivership is not really ancillary to some other suit.

[3] Courts of equity have from earliest times had power to protect the property of infants and lunatics. As to the nature and origin of this power, see 3 POMEROY, EQUITY JURISPRUDENCE, §§ 1304–07, 1311 *et seq.*; BISPHAM, EQUITY, §§ 541–43, 551–52. As a result of this "particular" jurisdiction the court will always appoint a receiver for an infant or a lunatic in a proper case, although the receiver is the sole object of the suit. *Ex parte* Whitfield, 2 Atk. 315; Jones *v.* Bank of Leadville, 10 Colo. 464, 17 Pac.

the suit.[4] This doctrine apparently exists as a supposed logical conclusion from the basic nature of common law courts either of equity or law, as tribunals whose sole function is to adjudicate and give effect to remedial rights arising from some past or threatened injury.[5] On the theory of the cases, the appointment of a receiver where there is no suit for another remedy pending is an extension of the functions of the court beyond this sphere, an exercise of administrative powers savoring of a delegated *pater patriae* jurisdiction, which certainly courts have never possessed. The premise, and this proposition as to the basic nature of common law courts, are undoubtedly correct, but we question the logical necessity of the conclusion.

Where a receiver is asked for the mere purpose of handling the property of a capable legal person and taking care of his affairs, here clearly equity would be acting purely in a guardianship capacity, which it has no power to do.[6] Any such extension of equity's jurisdiction must come from the legislature. But in many cases where a receiver *sole* is sought, the situation is quite different. In *Thompson's Receivership*, for instance, the petitioners are unsecured creditors of Thompson. There are other secured creditors who are in a position to realize on their securities. If this is done, the petitioners will lose all chance of recovery; if on the other hand the secured creditors stay their hand, Thompson will in all probability be able to satisfy all parties. The petitioners come into equity. Their bill asserts the existence of certain legal rights in the petitioners; that the satisfaction of those rights will be jeopardized by the action of other creditors in enforcing their legal rights; that there are circumstances which make such action of the other creditors inequitable, and prays the court to grant relief. In other words, it clearly claims a remedial right to the prevention of an injury, and seeks to have this right adjudicated and made effective by the appointment of a receiver.[7] Whether or not, on the

272; Baker *v.* Backus, 32 Ill. 79. Also where there is a dispute as to the administration of the estate of a decedent, and no one to handle the property, the court will appoint a receiver, though ancillary to no other relief. Atkinson *v.* Henshaw, 2 Ves. & B. 85; Flagler *v.* Blunt, 32 N. J. Eq. 518.

[4] Mabon *v.* Ongley Electric Co., 156 N. Y. 196, 50 N. E. 805; State *v.* Ross, 122 Mo. 435, 25 S. W. 947; Stockholders of Jefferson County Agricultural Ass'n. *v.* Jefferson County Agricultural Ass'n., 155 Ia. 634, 136 N. W. 672; Vila *v.* Grand Island Electric Light, etc. Co., 68 Neb. 222, 94 N. W. 136.

[5] See State *v.* Ross, 122 Mo. 435, 457, 25 S. W. 947, 952; Jones *v.* Bank of Leadville, 10 Colo. 464, 473, 17 Pac. 272, 276.

It has been suggested that the fundamental reason for the doctrine that equity will not grant a receiver where that is the sole object of the suit lies not in the fact that there is no "case" presented, but rather in the fact that a receiver is a most dangerous and extraordinary remedy, use of which should be restricted. The suggestion is evidently one that deserves consideration, and one that should weigh with courts in determining whether or not, in particular cases, a receiver should be granted. But the cases make no mention of such a reason as a ground for lack of jurisdiction, and it is not entirely clear that it will cut down the number of cases in which the power exists. For in any case where a receiver *sole* would properly be granted under our view, a receiver would properly be granted as ancillary to the suit, if it had been brought for general relief or for some specific relief other than a receiver. To lay down the rule flatly therefore does not limit the states of fact in which receivers may be granted, but merely requires parties, in order to get the relief that they most need, to ask for some other to which they also have a right.

[6] For such a case, see Mabon *v.* Ongley Electric Co., 156 N. Y. 196, 50 N. E. 805.

[7] For other cases where a remedial right is really claimed in a suit for a receiver alone,

facts, the petitioners have a remedial right is another question,[8] but they clearly come into court claiming one and seeking its effectuation. Where this is true, there is no lack of jurisdiction on the ground that judicial tribunals exist only to try "cases" and that this is not a "case."

But the courts, in general, make no distinction between such a case as this and one where a mere guardianship is sought. Looking hard at the formal remedy, which does indeed smack of guardianship, they have formulated a general rule and refuse relief indiscriminately in all cases where a receiver is the sole object of the suit.[9] Unfortunately for a realization and correction of the error, the result reached is many times a just one upon a balance of the equities, for in almost all such cases the plaintiff is seeking to stay the enforcement of a legal right, and he should show a strong case to move equity to act.[10]

The view that we have advocated has some sanction of authority. Three United States courts have granted receivers for railroad corporations in embarrassed circumstances, where the receiver was the only relief sought.[11] The opinions stress the great inconvenience to the public if the railroads be forced out of business, and on this ground invoke a strong public policy in support of granting the relief. But such a consideration goes merely to the balance of the conveniences in determining the equities of the plaintiff's claim, and could not give a court power to go beyond its sphere as a trier of "cases." These cases then must be taken to decide that there was a real "case" [12] involved and that the court had jurisdiction to act in the premises.[13] Again some courts have granted a receiver

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see Stockholders of Jefferson County Agricultural Ass'n. *v.* Jefferson County Agricultural Ass'n., 155 Ia. 634, 136 N. W. 672; Smiley *v.* Sioux Beet Syrup Co., 71 Neb. 581, 101 N. W. 253; Baltimore Bargain House *v.* St. Clair, 58 W. Va. 565, 52 S. E. 660. Where the plaintiff claims a receiver for his own property, he may equally be claiming a remedial right, the difference lying solely in the nature of the injury. For a case of this sort, see Central Trust Co. *v.* Wabash, etc. Ry. Co., 29 Fed. 618.

[8] See *infra*, note 17. The existence of a remedial right in Thompson's Receivership seems open to grave doubt. The secured creditors are after all only enforcing legal rights, and the danger of losing a remedy by the sacrifice of property upon foreclosure is a danger that the petitioners share, though here in an extraordinary degree, with all unsecured creditors.

[9] See cases in note 4.

[10] Indeed some of the cases apparently fail to distinguish between the questions whether or not the plaintiff has a "case" within judicial cognizance, and whether or not he has a good case, and adduce considerations bearing upon the latter for the determination of the former. See Smiley *v.* Sioux Beet Sugar Co., 71 Neb. 518, 589 *et seq.*, 101 N. W. 253, 254; Baltimore Bargain House *v.* St. Clair, 58 W. Va. 565, 571, 52 S. E. 660, 662. The seriousness of such a confusion becomes apparent when it is remembered that if there is no "case" a court has no jurisdiction to act at all, and its decree can be attacked collaterally. See State *v.* Ross, 122 Mo. 435, 461, 25 S. W. 947.

[11] Brassey *v.* N. Y. & N. E. R. Co., 19 Fed. 663; Central Trust Co. *v.* Wabash, etc. Ry. Co., 29 Fed. 618; Clark *v.* Central R. & Banking Co. of Georgia, 54 Fed. 556. The question has never been presented to the Supreme Court of the United States. See, however, Quincy, Mississippi & Pacific R. Co. *v.* Humphreys, 145 U. S. 82; and St. Joseph & St. Louis R. Co. *v.* Humphreys, 145 U. S. 105, in both of which Fuller, C. J., makes some reference to this doctrine.

[12] In the Wabash case, for instance, the suit upon analysis appears to be a bill by the railroad in a fiduciary capacity as to the stockholders, seeking help in carrying out the fiduciary duties. It has in addition a certain likeness to a bill of peace, in that it seeks relief from a multiplicity of foreclosure suits in various jurisdictions.

[13] See Brassey *v.* N. Y. & N. E. R. Co., 19 Fed. 663, 669. The appointment of a receiver in a suit solely for that purpose, in cases where a public utility is involved, may

sole over mortgaged property upon suit of the mortgagee, before the mortgage debt is due and when the property is in danger of being dissipated.[14] These cases have been differentiated from those of unsecured creditors on the ground that the plaintiff here has a property interest. But this also merely strengthens the equity of the plaintiff's case, and the courts, in reaching their result, must be deciding that there is a "case" involved, despite the fact that a receiver is the only relief sought.[15]

On the other hand, the same courts, if these particular facts are not present, will apply the general rule though the plaintiff is just as clearly claiming a remedial right and seeking its adjudication. This inconsistency can only be explained on the ground that courts, chary of overturning precedents, have felt moved to do so only in cases where the plaintiff's claim was peculiarly strong.[16] Their conservatism in this respect is to be deplored and the initiative of the court in *Thompson's Receivership* to be commended. Where the plaintiff has a true remedial right [17] and a receiver is a convenient method of relief,[18] a court should not refuse to take jurisdiction because of a traditional rule which is clearly wider than its reason.[19]

RAISING FREIGHT RATES OF INTERSTATE RAILROADS AFTER ELIMINATION OF WATER COMPETITION. — Section 3 of the Interstate Commerce Act requires that no undue preference in freight rates shall be given by a carrier to one locality over another.[1] The first part of section 4 provides

perhaps be upheld by a resort to the visitorial jurisdiction, even if the case is one of mere guardianship. For a discussion of the visitorial power of chancery over public institutions, see 1 BLACKSTONE, COMMENTARIES, 480–81; 2 KENT, COMMENTARIES, 300–03. Such an explanation of these cases has been hinted at by a modern textwriter. BEACH, RECEIVERS, 2 ed., 75.

[14] Rose *v.* Bevan, 10 Md. 466; Long Dock Co. *v.* Mallery, 12 N. J. Eq. 431.

[15] See Davis *v.* Alton, Jacksonville & Peoria Ry. Co., 180 Ill. App. 1, where the court, though refusing to grant a receiver upon other grounds, expressly recognizes that the fact that there is no other relief sought to which the appointment of a receiver is incidental is not necessarily fatal to the court's jurisdiction.

For another situation in which courts have granted a receiver where no other relief was sought, see American Freehold Land Mortgage Co. *v.* Turner, 95 Ala. 272, 11 So. 211.

[16] As in the case of public service corporations, where the plaintiff could invoke a strong public policy, and in the mortgage cases, where he has a lien interest in the property.

[17] Whether or not the plaintiff has stated a case in which equity should act must be determined by a balancing of the considerations on both sides, in the particular case, on ordinary principles.

[18] Once establish the right to relief, and it cannot be questioned that the principal case is one where the use of the extraordinary remedy of a receivership is proper. It is indeed the only method by which the situation can be adequately handled. See HIGH, RECEIVERS, § 7; BEACH, RECEIVERS, 2 ed., § 48.

[19] Whether or not jurisdiction of the parties whose action the plaintiff is seeking to prevent by the receivership should be necessary, since their rights are in a sense being adjudicated, is an arguable question. There is no personal decree against them. The decree runs against the property and is enforced *in rem*. The property is merely taken under the protection of the court for a time. In so far as it does adjudicate any rights of parties not before the court, the only result of such adjudication is the temporary postponement of the enforcement of a legal right. It would seem that a service by publication at most should be sufficient. See the remarks of the court in the principal case, 44 Pa. County Court, 518, 532.

[1] U. S. COMP. STAT. 1913, § 8565, in part provides: "It shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unrea-